

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 RICHARD G. HARMS, as personal  
12 representative of the Estate of KURT  
STANLEY HARMS.

Plaintiff,

14 || v.

LOCKHEED MARTIN CORPORATION,  
Defendant.

CASE NO. C06-572JLR

**ORDER DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

This matter comes before the court on Defendant Lockheed Martin Corporation’s (“Lockheed”) motion for summary judgment (Dkt. # 40). The court DENIES the motion.

## 1. BACKGROUND

22 The relevant facts are not in dispute. In March 2005, Kurt Harms died as the  
23 result of injuries sustained in a car crash on an Australian highway. Am. Compl. ¶¶ 3.8-  
24 3.15 (Dkt. # 3). He was the passenger in a car driven by Gary Boughton, a Lockheed  
25 employee who was acting within the scope and course of his employment. *Id.* ¶ 3.15;  
26 Answer ¶ 10 (Dkt. # 10). Plaintiff contends that Mr. Harms' death was the result of Mr.  
27 Boughton's negligence. Resp. at 2 (Dkt. # 45).

1 Mr. Harms was unmarried and had no children. *Id.* He was survived by his father,  
 2 his brother, and his sister, none of whom was dependent on Mr. Harms for financial  
 3 support. *Id.* His father, Richard Harms, brought this action for tortious death as personal  
 4 representative for Kurt Harms' estate ("estate"). Am. Compl. ¶¶ 4.1-4.2.

5 The estate concedes that it has no cognizable claims under Washington's wrongful  
 6 death statutes, RCW §§ 4.20.010 (wrongful death), 4.20.020 (beneficiaries of wrongful  
 7 death), and 4.24.010 (child death/injury), or the special survival statute, RCW § 4.20.060  
 8 (death by personal injury), because Mr. Harms left no statutory beneficiaries enumerated  
 9 in RCW § 4.20.020.<sup>1</sup> Resp. at 3-4. The estate contends, however, that it may still seek  
 10 economic damages under the general survival statute, RCW § 4.20.046. *Id.*

## 11                   II. ANALYSIS

12                   Lockheed moves for summary judgment based on a purely legal question. First,  
 13 Lockheed argues that the general survival statute, RCW § 4.20.046, disallows suits by a  
 14 decedent who dies from the injuries that form the basis of the complaint. Mot. at 5-6.  
 15 Second, Lockheed contends that the general survival statute prohibits recovery by the  
 16 estate when there are no statutory beneficiaries. *Id.* at 8-10. In effect, Lockheed argues  
 17 that Washington law prohibits an estate from recovering against a tortfeasor unless the  
 18 decedent had statutory beneficiaries and died from other causes.

20                   The court disagrees. Lockheed misreads the relevant statutes and misconstrues  
 21 well-settled case law.

### 22                   A. Standard of Review

23                   Summary judgment is appropriate if the evidence, when viewed in the light most  
 24 favorable to the non-moving party, demonstrates there is no genuine issue of material  
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26                   <sup>1</sup>Effective July 22, 2007, RCW §§ 4.20.020 and 4.20.060 were revised to insert references  
 27 to state registered domestic partners. *See* 2007 Wash. Legis. Serv. Ch. 156 (S.S.B. 5336)  
 28 (West). The pre-July 2007 versions apply here.

1 fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*  
 2 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). For purely legal questions,  
 3 summary judgment is appropriate without deference to the non-moving party.

4 **B. Scope of Survival Actions**

5 Lockheed's interpretation of the law would mean that a tortfeasor could  
 6 negligently kill a person who lacked statutory beneficiaries without being liable to  
 7 anyone. That tortured logic conflates wrongful death and survival actions, on one hand,  
 8 and confuses the scope of the general and special survival actions, on the other.

9 The right to bring tortious death claims is purely statutory. *See Warner v.*  
 10 *McCaughan*, 460 P.2d 272, 274 (Wash. 1969)<sup>2</sup>; *Tait v. Wahl*, 987 P.2d 127, 130 (Wash.  
 11 Ct. App. 1999). In Washington, these claims may be brought pursuant to the wrongful  
 12 death statutes, RCW §§ 4.20.010, 4.20.020, 4.24.010, and the survival statutes, RCW §§  
 13 4.20.046 and 4.20.060. *See Otani v. Broudy*, 92 P.3d 192, 194 (Wash. 2004); *Masunaga*  
 14 *v. Gapasin*, 790 P.2d 171, 172 (Wash. Ct. App. 1990). The primary differences between  
 15 wrongful death and survival actions are in (1) the causes of action, and (2) the  
 16 beneficiaries. *See Otani*, 92 P.3d at 198; Michael M. Martin, *Measuring Damages in*  
 17 *Survival Actions for Tortious Death*, 47 Wash. L. Rev. 609, 610 (1972).

18 The wrongful death statutes create *new* causes of action for statutory beneficiaries  
 19 of the deceased to recover their own damages. RCW §§ 4.20.010, 4.20.020; *see Otani*,  
 20 92 P.3d at 195. In contrast, the survival statutes do not create new causes of action but  
 21 instead *preserve* causes of action for a decedent's personal representative that the  
 22 decedent could have maintained had he or she not died. RCW § 4.20.046, 4.20.060; *see*  
 23 *Otani*, 92 P.3d at 194-95, 198. The beneficiaries of these preserved claims are either the  
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 27 <sup>2</sup>*Warner* remains the seminal case in any discussion of the general survival statute, though  
 28 its discussion of the proper measure of damages was clarified in *Wooldridge v. Wolett*, 638 P.2d  
 566, 568-570 (Wash. 1981).

1 decedent's (a) estate (the creditors and the heirs or devisees), or, under certain  
2 circumstances, (b) statutory beneficiaries. RCW § 4.20.046; RCW §§ 4.20.060; *see*  
3 *Otani*, 92 P.3d at 198; *Warner*, 460 P.2d at 276; *Tait*, 987 P.2d at 131 ("[U]nlike the  
4 wrongful death and special survival statutes, the decedent's personal representative can  
5 recover damages under [the general survival statute] on behalf of the decedent's estate.");  
6 *Martin*, *supra*, at 612.

7 Lockheed makes an unwarranted attempt to impose the requirements of the special  
8 survival statute<sup>3</sup> onto the general survival statute.<sup>4</sup> But the special and general survival  
9 statutes differ as to *which* survival claims are preserved and *who* will collect the

<sup>3</sup>In relevant part, the special survival statute provides:

*No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse or child living, including stepchildren, or leaving no surviving spouse or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse, or in favor of the surviving spouse and such children, or if no surviving spouse, in favor of such child or children, or if no surviving spouse or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.*

<sup>4</sup>In relevant part, the general survival statute provides:

*All causes of action* by a person or persons against another person or persons shall survive *to the personal representatives of the former* and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action.

RCW § 4.20.046(1) (emphases added).

1 decedent's damages. Unsurprisingly, the *special* survival statute is narrow and preserves  
 2 the decedent's claims for death by the complained of injuries on behalf of statutory  
 3 beneficiaries. The *general* survival statute is broad and preserves *all* claims on behalf of  
 4 the estate (as to economic damages) *and* on behalf of statutory beneficiaries (as to certain  
 5 non-economic damages).

6 In *Warner v. McCauglin*, the Washington Supreme Court recognized the broad  
 7 scope of the general survival statute. It found that the special survival statute did not  
 8 restrict the applicability of the general survival statute because the “legislature was intent  
 9 on preserving causes of action, rather than pleas of abatement.” *Warner*, 460 P.2d at 276  
 10 (quoting *Engen v. Arnold*, 379 P.2d 990, 993 (Wash. 1963)). It held, therefore, that the  
 11 estate could recover damages under the general survival statute for a decedent who left  
 12 behind no statutory beneficiaries and died as the result of the complained of injuries. *See*  
 13 *id.* at 276-77 (holding that wrongful death action did not apply because there were no  
 14 statutory beneficiaries). The court noted that, in enacting the general survival statute, the  
 15 legislature meant for *all* causes of action to survive so that it would not be more profitable  
 16 for the defendant “to kill the plaintiff than to scratch him,” thereby leaving “the bereaved  
 17 family of the victim . . . without a remedy.” *Id.* at 275 (quoting Dean Prosser, Prosser on  
 18 Torts, § 121, at 924 (3d ed. 1964)); *see Otani*, 92 P.3d at 198 (“Although Washington’s  
 19 wrongful death and survival statutes benefit different parties, they provide recoverable  
 20 damages for the death or injury of another, depending on the circumstances. Thus it is  
 21 not cheaper for a defendant to kill, instead of injure, another person in Washington.”).

22 “It is well settled law that the estate of a person who dies after birth can maintain a  
 23 survival cause of action under [the general survival statute].” *Cavazos v. Franklin*, 867  
 24 P.2d 674, 676 (Wash. Ct. App. 1994) (holding that the estate of a viable, unborn child  
 25 could recover under general survival statute); *see Criscuola v. Andrews*, 507 P.2d 149,  
 26 150 (Wash. 1973) (holding that the estate of person who died instantaneously and left no  
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1 statutory beneficiaries could recover under general survival statute when death is  
 2 instantaneous and decedent left no statutory beneficiaries); *Balmer v. Dilley*, 502 P.2d  
 3 456, 458 (Wash. 1972) (holding that estate of boy who died in car crash could recover  
 4 damages under general survival statute); *see, e.g., Federated Servs. Ins. Co. v. Personal*  
 5 *Representative of Estate of Norberg*, 4 P.3d 844 (Wash. Ct. App. 2000) (reviewing the  
 6 proper measure of damages permissible under general survival statute to estate for  
 7 decedent who died in head-on collision and left no statutory beneficiaries). The estate's  
 8 right to recover damages under the general survival statute is limited to the lost net  
 9 accumulations of the decedent. *See Wooldridge*, 638 P.2d at 570; *Norberg*, 4 P.3d at  
 10 848; *Tait*, 987 P.2d at 131-32.

11       Thus, Lockheed's arguments must fail unless it can show that the legislature has  
 12 restricted damages available to decedents' estates under the general survival statute or the  
 13 courts have overturned well-settled case law.

14 **C. Injuries Causing Death**

15       Lockheed argues that because the special survival statute applies only to actions  
 16 brought by a personal representative on behalf of statutorily designated beneficiaries for  
 17 injuries that cause the decedent's death, the general survival statute contains a similar  
 18 limitation, i.e., it applies *only* to "actions brought by a personal representative on behalf  
 19 of the estate for injuries suffered by a decedent that did not cause the decedent's death."  
 20 Mot. at 5 (quoting *Higbee v. Shorewood Osteopathic Hosp.*, 711 P.2d 306, 309 (Wash.  
 21 1985)). Lockheed contends that the estate cannot recover here because Kurt Harms died  
 22 from the injuries sustained in a car crash and those injuries serve as the basis of the  
 23 complaint. The court rejects this evisceration of the general survival statute.

24       The general survival statute was enacted to rectify the anomaly of it being "more  
 25 profitable for the defendant to kill the plaintiff than to scratch him." *See Warner*, 400  
 26 P.2d at 275 (citation omitted). Only in a looking-glass world would a statute that  
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1 specifies that “[a]ll causes of action . . . shall survive,” RCW § 4.20.046(1) (emphasis  
 2 added), actually exclude actions for injuries that led to death. The *Higbee* court never  
 3 carved out such a categorical exclusion. *See Higbee*, 711 P.2d at 309 (noting that “[t]he  
 4 general survival statute . . . applies to” actions for injuries not leading to death, but that  
 5 “[t]he special survival statute . . . applies only to” actions for injuries leading to death)  
 6 (emphases added).

7 The *Higbee* court relied upon *Walton v. Absher Constr. Co.*, 676 P.2d 1002, 1004  
 8 (Wash. 1984), for its description of the general survival statute’s scope. In *Walton*, the  
 9 Washington Supreme Court explicitly approved the *Warner* court’s reconciliation of the  
 10 general and survival statutes. *Id.* (noting that the court was presented with the “flip side  
 11 of the issue before the *Warner* court,” i.e., whether the general survival statute implicitly  
 12 restricted recovery of non-economic damages under the special survival statute). The  
 13 *Warner* court permitted the estate of a woman who left no statutory beneficiaries to  
 14 recover under the general survival statute for damages arising out of her death. *See*  
 15 *Warner*, 460 P.2d at 276.

16 Read in proper context, the *Higbee* court stated no more than that *unlike* the  
 17 special survival statute, the general survival statute applies to actions for injuries not  
 18 leading to death. *Cf.* RCW § 4.20.046(1) (noting that statutory beneficiaries may *also*  
 19 recover certain non-economic damages “whether or not the death was occasioned by the  
 20 injury that is the basis for the action”). The same holds true for Lockheed’s citation to  
 21 *Otani ex rel. Shigaki v. Broudy*. *See Otani*, 92 P.3d at 195-96 (noting that estate could  
 22 recover for lost net accumulations and not restricting such damages only to injuries that  
 23 caused death). The court rejects Lockheed’s suggestion that the general survival statute  
 24 applies *only* where the decedent’s injuries did not cause the decedent’s death. “Were we  
 25 to read [the general survival statute] so restrictively, the estate of a decedent with no  
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1 surviving statutory beneficiaries could not recover injuries which caused the decedent's  
 2 death . . . ." *Vail v. Toftness*, 753 P.2d 553, 555 n.1 (Wash. Ct. App. 1988).

3 **D. Recovery by the Estate**

4 Lockheed argues that the general survival statute requires that Kurt Harms be  
 5 survived by statutory beneficiaries in order for the *estate* to recover on his behalf. Reply  
 6 at 2-7. Its theory is based on its misreading of the statute's language and case law dicta.

7 Lockheed argues that the following language from the general survival statute  
 8 supports its position: "PROVIDED, HOWEVER, That the personal representative shall  
 9 only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or  
 10 humiliation personal to and suffered by a deceased on behalf of those beneficiaries  
 11 enumerated in RCW 4.20.020 . . ." RCW § 4.20.046(1). But this language, added in a  
 12 1993 amendment to the statute, was an *expansion*, not a contraction, of damages available  
 13 under the general survival statute.

14 Prior to 1993, recovery for non-economic damages such as pain and suffering was  
 15 available to statutory beneficiaries under the special survival statute but was not available  
 16 to *anyone* under the general survival statute. *Compare* 1961 Wash. Laws Ch. 137, § 1  
 17 with RCW § 4.20.046 and RCW § 4.20.060. Thus, statutory beneficiaries could not  
 18 recover for non-economic damages if the decedent died, for example, of old age during  
 19 the pendency of their personal injury case. This loophole rewarded insurance managers  
 20 who delayed settlements with elderly victims: they would pay less if the injured party  
 21 died. *See* House Bill Report, SB 5077, at 1-2, reported by House Committee on Judiciary  
 22 (1993). The legislative history shows that the 1993 amendment was meant to close this  
 23 loophole by permitting statutory beneficiaries to recover those non-economic damages  
 24 under the general survival statute. *See id.* That is, because the general survival statute  
 25 encompassed *all* survival actions, whether the person died or not, the legislature found it  
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1 an expeditious way to afford a certain class of beneficiaries the same kind of damages  
 2 afforded under the special survival statute.

3 The legislature never indicated the intent to curtail recovery of purely economic  
 4 damages by the estate. Both pre- and post-1993, the estate is not entitled to recover *non-*  
 5 *economic damages* (pain and suffering, etc.) on behalf of the decedent. *Compare* 1961  
 6 Wash. Laws Ch. 137, § 1 *with* RCW § 4.20.046. The legislature expanded the general  
 7 survival statute's scope and left the estate's right to recovery alone. *See* House Bill  
 8 Report, SB 5077, at 1-2.

9 Lockheed relies upon generalized dicta to reach the contrary position. For  
 10 example, in *Philippides v. Bernard*, 88 P.3d 939, 944 (Wash. 2004), the court stated:  
 11 “Washington’s four interrelated statutory causes of action for wrongful death and survival  
 12 each require that parents be ‘dependent for support’ on a deceased adult child in order to  
 13 recover. *See* RCW 4.20.010 (child injury/death) [sic]<sup>5</sup>; RCW 4.20.020 (wrongful death);  
 14 RCW 4.20.046 (general survival statute); RCW 4.20.060 (special survival statute).” *See*,  
 15 *e.g.*, *Schumacher v. Williams*, 28 P.3d 792, 797 (Wash. Ct. App. 2001) (examining child  
 16 injury/death statute but noting that “the beneficiaries under both the survival of action  
 17 provisions and the wrongful death statute have not included siblings or parents who are  
 18 not dependent on the decedent for support”).<sup>6</sup> There is no further discussion of the  
 19 general survival statute. In only one of the cases cited by Lockheed did a court hold that  
 20 the personal representative could not maintain an action under the general survival statute  
 21 because the decedent lacked statutory beneficiaries. *See Rentz v. Spokane County*, 438

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 24       <sup>5</sup>The child injury/death statute is at RCW 4.24.010. The wrongful death statute is RCW  
 25 4.20.010 and the beneficiaries for a wrongful death action are set forth in RCW 4.20.020.

26       <sup>6</sup>Lockheed cites *Masunaga v. Gapasin* in support of its argument, but the case undermines  
 27 its position. First, *Masunaga* addressed the child injury/death statute, RCW 4.24.010, which is  
 28 not applicable here. *Masunaga*, 790 P.2d at 172. Second, the estate’s claims were not before the  
 court because they had been settled beforehand. *Id.*

1 F. Supp. 2d 1252 (E.D. Wash. 2006). In that decision, the court referred to the broad  
2 summation sentence in *Philippides* and held summary judgment to be proper. *Id.* at 1259.

3 The *Philippides* court never suggested that its single-sentence summation about  
4 tortious death overturned the well-settled understanding that an estate may recover under  
5 the general survival statute for economic damages due a decedent who leaves no statutory  
6 beneficiaries. *See, e.g., Norberg*, 4 P.3d at 846; *Wooldridge*, 638 P.2d at 567; *Walton*,  
7 676 P.2d at 1004; *Criscuola*, 507 P.2d at 150; *Balmer*, 502 P.2d at 458; *Warner*, 460  
8 P.2d at 276; *Tait*, 987 P.2d at 131; *Cavazos*, 867 P.2d at 677; *Wagner v. Flightcraft, Inc.*,  
9 643 P.2d 906, 912 (Wash. Ct. App. 1982). *Cf. Otani*, 92 P.3d at 195 (“[S]pecifically,  
10 recovery under the general survival statute is for the benefit of, and passes through, the  
11 decedent’s estate, whereas recovery under the special survival statute is for the benefit of,  
12 and is distributed directly to, the statutory beneficiaries.”). The court, therefore, rejects  
13 both Lockheed’s argument and the conclusion in *Rentz*.<sup>7</sup>

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15 **III. CONCLUSION**

16 For the reasons stated, the court DENIES Lockheed’s motion for summary  
17 judgment (Dkt. # 40).

18 Dated this 27th day of September, 2007.

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